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19 **UNITED STATES BANKRUPTCY COURT**

20 **DISTRICT OF NEVADA**

21 IN RE:

22 EXECUTIVE PLASTERING, Inc.

23 Debtor

) CASE NO: BK-S-09-33776 BAM

) CHAPTER: 7

) **MOTION FOR RELIEF FROM**
) **AUTOMATIC STAY**

24 Hearing Date: June 29, 2010

25 Hearing Time: 1:30 p.m.

26 Estimated Time: 10 minutes

27 **COMES NOW** Del Webb Communities, Inc., (hereinafter "Del Webb") by and
28 through its attorneys, KOELLER, NEBEKER, CARLSON & HALUCK, LLP, and respectfully
moves this Honorable Court, for an Order lifting the automatic bankruptcy stay pursuant to 11
U.S.C. § 362(d) in three lawsuits maintained in the Clark County District Court. Del Webb
seeks relief from the automatic stay so that it may proceed only against the available insurance

1 assets of debtor Executive Plastering, Inc. (hereinafter "Debtor.") If the requested relief is
2 granted, Del Webb would waive any claims it had against the subject bankruptcy estate.

3 This Motion is based upon the attached Memorandum of Points and Authorities, the
4 pleadings and papers on file and such other and further evidence as may be offered at the time
5 of the hearing of this Motion.

6
7 DATED this 28th Day of May, 2010.

8
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17
18 **I. STATEMENT OF FACTS**

19 On or about December 21, 2009, debtor filed a voluntary petition for relief under
20 Chapter 7 of the United States Bankruptcy Code, Nevada Bankruptcy Court case No. BK-S 09-
21 3376 BAM. Del Webb is a creditor of Debtor and, therefore, qualifies as a party in interest in
22 this case. Del Webb seeks to proceed against available insurance assets of Debtor in the
23 following construction defect matters.

24 ***A. Del Webb Communities, Inc., v. Adams Brothers Interiors of Nevada et. al., Clark***
25 ***County District Court Case No.: A604438***

26 Between December of 2006 and August of 2008, the owners of 48 single-family homes
27 in the Sun City Anthem development brought Notices of Construction Defect against Del
28 Webb, pursuant to Nevada's construction defect statute, N.R.S. 40.645, alleging various

1 construction defects, including but not limited to defects pertaining to the stucco, drywall,
2 windows, and floor coverings in their homes. On or about April 16, 2008 and July 29, 2008,
3 Del Webb settled the Chapter 40 Action. Debtor was among the subcontractors whose work in
4 the construction of the subject homes was implicated in the Notice forwarded by the
5 homeowners. Debtor did not participate in or fund any part of the settlement despite requests
6 from Del Webb to do so. In the interest of resolving the Chapter 40 Action, Del Webb
7 compromised the Chapter 40 Action without a contribution from Debtor, but retained all rights
8 to pursue Debtor and other subcontractors in a subsequent action. On December 1, 2009, Del
9 Webb filed its Complaint naming Debtor, among other subcontractors, as Defendants in the
10 case. Del Webb alleges causes of action and seeks damages based upon principles of express
11 indemnity, equitable indemnity, and breach of contract. A true and correct copy of Del
12 Webb's Complaint is attached hereto as Exhibit "A."

13 Debtor was served with Del Webb's Complaint on December 23, 2009. On February
14 10, 2010, Debtor's bankruptcy counsel filed its Suggestion of Bankruptcy Petition as an amicus
15 curiae notice to the District Court.

16 Del Webb seeks recovery from Debtor for indemnification and payment of the total
17 settlement amount in the Chapter 40 action, as detailed in Del Webb's Complaint, together
18 with Del Webb's attorneys' fees, expenses, and costs of suit incurred in prosecuting its case
19 against Debtor and other defendants.

20 ***B. Fisher et. al v. Del Webb Communities, Inc., Clark County District Court Case***
21 ***No.: A559767***

22 *Fisher et. al. v. Del Webb Communities, Inc.*, Clark County District Court Case No.:
23 A559767, is the title case in a pair of consolidated construction defect cases involving homes
24 in the Sun City Anthem Community, the other case being *Trigger et. al v. Del Webb*
25 *Communities, Inc.*, Clark County District Court Case No. A587112. Plaintiffs in *Trigger* filed
26 their Complaint April 6, 2009. That case was removed to Federal Court on May 12, 2009. Del
27 Webb filed its Third-Party Complaint on May 18, 2009 naming Debtor, among other
28 subcontractors, as Third-Party Defendants in the case and asserted claims for breach of

1 contract, express indemnity, equitable indemnity, breach of express warranty, breach of
2 implied warranty, and contribution. Del Webb also seeks declaratory relief as to Third-Party
3 Defendants' duties to indemnify, defend, and name Del Webb as an additional insured in their
4 policies of general liability insurance. The case was remanded to state court on July 30, 2009.
5 Debtor was served with the Third-Party Complaint on August 3, 2009. *Fisher and Trigger*
6 were consolidated on November 11, 2009 under case number A559767. True and correct
7 copies of the operative Complaint, Third-Party Complaint, and Summons to Debtor, are
8 attached hereto as Exhibits "B", "C", and "D," respectively.

9 Del Webb seeks recovery from Debtor for indemnification and payment of the total
10 amount of any judgment rendered against Del Webb based on the Complaint, together with Del
11 Webb's attorneys' fees, expenses, and costs of suit incurred in prosecuting its Third-Party
12 Complaint case against Debtor and other defendants.

13 ***C. Sun City Anthem Community Association v. Del Webb Communities, Inc., Clark***
14 ***County District Court Case No.: A608708***

15 Plaintiff Sun City Anthem Community Association filed its Complaint on January 22,
16 2010, naming Del Webb as Defendant in a constructional defect case alleging defects in the
17 common areas of the Sun City Anthem development. Plaintiffs assert causes of action for
18 breach of implied warranties, breach of express warranties, and negligence. A true and correct
19 copy of the Complaint is attached as Exhibit "E." Del Webb filed its Answer on March 10,
20 2010, and it's Third-Party Complaint on March 11, 2010, naming Debtor, among other
21 subcontractors, as Third-Party Defendants in the case. A true and correct copy of the Third-
22 Party Complaint is attached hereto as Exhibit "F." In its Third-Party Complaint, Del Webb
23 asserts claims for breach of contract, express indemnity, equitable indemnity, breach of express
24 warranty, breach of implied warranty, contribution, and declaratory relief as to Third-Party
25 Defendants' duties to indemnify, defend, and name Del Webb as an additional insured in
26 policies of general liability insurance. Del Webb did not serve Debtor with its Third-Party
27 Complaint.
28

1 Del Webb seeks recovery from Debtor for indemnification and payment of the total
2 amount of any judgment rendered against Del Webb based on the Complaint, together with Del
3 Webb's attorneys' fees, expenses, and costs of suit incurred in prosecuting its Third-Party
4 Complaint case against Debtor and other defendants.

5 ***D. Jacobsen v. Del Webb Communities, Inc., prelitigation matter pursuant to NRS***
6 ***40.600 et. seq., for 2580 Deora Way, Henderson, Nevada***

7 *Jacobsen* is a construction defect matter subject to the prelitigation requirements of
8 Nevada's construction defect statute, NRS 40.600 et. seq. The matter involves a single-family
9 home located at 2580 Deora Way, within the Sun City Anthem development in Henderson,
10 Nevada. On November 9, 2007, Claimants sent Del Webb a Notice of Constructional Defects
11 for the subject property. A true and correct copy of that Notice is attached hereto as Exhibit
12 "G." Among the defects alleged by Claimants were several related to the stucco application at
13 the property. At the time of construction of the subject property, Debtor conducted the
14 installation of the stucco system at the subject property pursuant to a contract it entered into
15 with Del Webb.

16 Pursuant to NRS 40.646, on December 4, 2007, Del Webb timely forwarded Claimants'
17 Notice to the subcontractors whose work is implicated in the defects alleged, including Debtor.
18 The property was inspected and Del Webb forwarded its Response to Claimants pursuant to
19 NRS 40.6472 on February 28, 2008. Mediation of the matter was conducted on February 26,
20 2010, marking the completion of the prelitigation requirements of NRS 40.600 et. seq.
21 Claimants are expected to file suit in the near future.

22 Del Webb seeks relief from the automatic stay in hopes of settling claims with Debtor
23 via its carriers utilizing only proceeds from applicable insurance policies. Del Webb
24 additionally seeks relief from the automatic stay so that when Claimants file their litigation, it
25 may name Debtor as a Third-Party Defendant and serve Debtor with its Third-Party Complaint
26 in order to trigger Debtor's carriers' participation in the litigation.

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28 ///

1 ***E. Debtor's Contractual Duties to Insure, Defend and Indemnify***

2 Del Webb's claims against Debtor in each of the above matters stem from subcontracts
3 entered into between Del Webb and Debtor whereby Debtor agreed to provide materials and
4 labor at the Sun City Anthem development. Pursuant to those subcontracts, Debtor agreed to
5 obtain general liability insurance with limits of combined bodily injury and property damage of
6 not less than \$1,000,000.00 per occurrence and \$2,000,000.00 aggregate. The subcontracts also
7 provide that Debtor was to name Del Webb as an additional-insured on its general liability
8 policies. Pursuant to the subcontracts, Debtor agreed to defend and indemnify Del Webb for
9 all claims directly or indirectly caused by Debtor's negligent or intentional act or omission in
10 Debtor's performance of the work described in the subcontracts between Debtor and Del
11 Webb. An exemplar Subcontract Agreement is attached hereto as Exhibit "H." The insurance
12 and indemnification language in all subcontracts executed between Del Webb and Debtor is
13 substantially the same as found in Exhibit "H."

14 In seeking relief from the automatic stay, Del Webb seeks to pursue its claims against
15 Debtor and recover only from the proceeds of Debtor's policies of commercial general liability
16 insurance. In the event that such policies are exhausted, Del Webb would not seek to recover
17 from Debtor directly, or from assets of the bankruptcy estate. Del Webb's recovery against
18 Debtor would be limited to the available coverage under those policies, and Del Webb would
19 waive its right to seek recovery from this Court for any further unsecured claim or deficiency
20 judgment resulting from any of the four constructional defect matters described above. Del
21 Webb would waive any claims against Debtor and the estate following liquidation and closure
22 of Debtor's bankruptcy case. Del Webb would also waive its claims, if any, to any deductible
23 or payment of any self-insured retention under the applicable policies.

24 **II. RELIEF REQUESTED.**

25 **A. Legal Standard Under 11 U.S.C § 362(d)(1)**

26 Del Webb seeks relief from the automatic stay in order to proceed with its claims
27 against Debtor in the above matter. Lifting the stay will allow the Debtor to participate in
28

1 those cases, and permit the District Courts to bring resolution to those cases as efficiently as
2 possible.

3 Section 362(d)(1) of the Bankruptcy Code provides:

4 (d) On request of a party in interest after notice and a hearing, the court shall
5 grant relief from the stay provided under subsection (a) of this section, such as
by terminating, annulling, modifying, or conditioning such stay -

6 (1) *for cause*, including the lack of adequate protection of an interest in
7 property of such party in interest...

8 11 U.S.C. § 362(d) (emphasis added). “The burden of proof on a motion to modify the
9 automatic stay is a shifting one” as the party seeking relief must establish a prima facie case
10 that there exists cause for relief under 11 U.S.C. § 362(d)(1). *In re Smith*, 389 B.R. 902, 918
11 (Bkrcty.D.Nev.2008); *In re Duvar Apt., Inc.*, 205 B.R. 196, 200 (9th Cir. BAP 1996). Once the
12 moving party has established a prima facie case, the burden shifts to the debtor to show that
13 relief from the stay is unwarranted. 11 U.S.C. §362 (g)(2); *In re Sonmax*, 907 F.2d 1280, 1285
14 (2nd Cir.1990); *In re Duvar Apt.*, 205 B.R. at 200.

15 Section 541(a) of the Code states that the debtor’s bankruptcy estate is comprised of
16 property in which the debtor has a legal or equitable interest. 11 U.S.C. §541(a)(1). Where
17 there exists a bona fide dispute as to whether property is part of the bankruptcy estate, the
18 burden is on the creditor to seek a determination from the bankruptcy court as to whether or not
19 such property is the subject to the automatic stay. *In re Petit*, 217 F.3d 1072, 1075 (9th Cir.
20 2000.) If it can be shown that the debtor does not have equity in property claimed to be part of
21 the estate, the bankruptcy court may lift the automatic stay. *In re Collins*, 199 B.R. 561, (Bankr
22 W.D.Pa. 1996); 11 U.S.C. §362(d)(2)(A).

23 Section 524(a) of the Bankruptcy Code explicitly renders judgments void for “...the
24 personal liability of the debtor...” 11 U.S.C. §524(a)(1). “Accordingly, the statutory language
25 on its face, does not preclude the determination of the debtor’s liability upon which the
26 damages would be owned to another party, such as the debtor’s liability insurance.” *In re Jet*
27 *Florida Systems, Inc.*, 883 F.2d 970, 973 (11th Cir. 1989).

The provisions of 524(a) apply only with respect to the personal liability of the debtor. When it is necessary to commence or continue suit against a debtor in order, for example, to establish liability of another, perhaps a surety, such suit would not be barred. Section 524(e) was intended for the benefit of the debtor but was not meant to affect the liability of third parties or to prevent establishing such liability through whatever means required.

Id., (Internal citation omitted.) Accordingly, the Code does not seek to shield third parties, such as debtor's insurers, from liability. *Id.*

I. ARGUMENT

A. There is Just Cause for Granting Del Webb Relief from the Stay

There are twelve non-exclusive factors that should be weighed in determining whether to lift an automatic stay to permit pending litigation in another forum. *In re Smith*, 389 B.R. 902, 918-919 (Bkrtcy. D. Nev. 2008). Those factors, and Del Webb's analysis of each, are as follows:

- (1) Whether the relief would result in a partial or complete resolution of the issues(*Id.*);

If Del Webb is granted relief from stay for the purposes of establishing Debtor's liability in the underlying matters, it will be able to resolve all its claims for indemnification and contribution against Debtor in those matters.

- (2) The lack of any connection with or interference with the bankruptcy case (*Id.*);

There is no connection between any of the above matters and Debtor's bankruptcy case, nor will the pursuit of the Debtor in those matters interfere with the bankruptcy case.

- (3) Whether the other proceeding involves the debtor as a fiduciary (*Id.*);

The Debtor is not a fiduciary in any of the above matters;

- (4) Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action (*Id.*);

A specialized tribunal is not required to hear any of the state court matters. *Del Webb Communities, Inc v. Adams Bros. et. al* is underway in Department XIX of District Court, and

1 *Fisher et al v. Del Webb Communities Inc.*, and *Sun City Anthem Community Association v.*
 2 *Del Webb Communities, Inc.*, are both underway in Department XVI of the District Court.
 3 These departments are two of the three judicial departments which hear construction defect
 4 matters, and have established policies and protocols for doing so. *Jacobsen* is not yet in
 5 litigation.

6 (5) Whether the debtor's insurer has assumed full responsibility for
 7 defending it (*Id.*);

8 Debtor's insurance carriers have not yet assumed responsibility for the defense of
 9 Debtor in *Del Webb Communities, Inc v. Adams Bros. et. al.*, in *Jacobsen* above, or in *Sun City*
 10 *Anthem Community Association v. Del Webb Communities, Inc.* Del Webb is informed and
 11 believes that Debtor's insurance carriers have assumed responsibility for Debtor's defense in
 12 *Fisher et al v. Del Webb Communities Inc.* Should the stay be lifted, and Del Webb is allowed
 13 to pursue its claims against Debtor, it is likely that Debtor's insurance carriers will assume
 14 responsibility for Debtor's defense in these matters.

15 (6) Whether the action primarily involves third parties and the debtor
 16 functions only as a bailee or conduit for the goods or proceeds in
 question (*Id.*);

17 All the above matters involve subcontractors, such as the Debtor, who obtained
 18 insurance policies which name Del Webb as an additional insured. Accordingly, the Debtor, as
 19 an insured, would function only as a conduit for the insurance proceeds from those policies.
 20 Del Webb would not pursue Debtor personally or assets of its bankruptcy estate.

21 (7) Whether litigation in another forum would prejudice the interest of the
 22 other creditors or other interested parties (*Id.*);

23 Del Webb's pursuit of claims against Debtor in these matters will not prejudice the
 24 interest of other creditors in this bankruptcy, because Debtors' commercial general liability
 25 policies in question name Del Webb as an additional insured;

26 (8) Whether the judgment claim arising from the other action is subject to
 27 equitable subordination under Section 510(c) (*Id.*);

1 A judgment arising from any of these matters is not subject to equitable subordination
2 under Section 510(c).

3 (9) Whether movant's success in other proceeding would result in a
4 judicial lien avoidable by the debtor under Section 522(f) (*Id.*);

5 This factor is inapplicable for the above matters.

6 (10) The interests of judicial economy and the expeditious and economical
7 resolution of litigation (*Id.*);

8 Lifting the automatic stay will serve the interests of judicial economy and the
9 expeditious and economical determination of litigation by allowing Del Webb to negotiate
10 settlements of all claims against Debtor with Debtor's insurance carriers;

11 (11) Whether the parties are ready for trial in the other proceedings (*Id.*); and

12 *Del Webb Communities, Inc v. Adams Bros. et. al* is in its infancy and has yet to be
13 scheduled for trial. In *Fisher et al v. Del Webb Communities Inc.*, a scheduling order was
14 entered by the District Court on December 12, 2009 setting the trial date for October 10, 2011.
15 *Sun City Anthem Community Association v. Del Webb Communities, Inc.*, has not been
16 scheduled for trial, but the current case agenda issued by the Special Master over that case
17 establishes the earliest anticipated trial date as June 13, 2011. *Jacobsen* above is not yet in
18 litigation.

19 (12) Impact of the stay on the parties and the balance of harms (*Id.*);

20 Denial of the requested relief would severely prejudice Del Webb in its pursuit of its
21 claims in *Del Webb Communities, Inc, v. Adams Bros. et. al*. Denial of the request would also
22 severely prejudice its defense in the other above matters.

23 An examination of the factors above, yield the conclusion that just cause exists for
24 lifting the automatic stay. If the stay is not lifted precluding Del Webb from establishing the
25 Debtor's liability in these matters, Del Webb will be deprived of any recovery from Debtor's
26 implicated insurers. Bankruptcy courts have held that "...the goals of section 524(a) would not
27 be advanced by preventing a plaintiff from maintaining an action against the debtor in order to
28

1 establish the debtor's liability when that was a prerequisite to recovery from the insurer." *In re*
2 *Mann*, 58 B.R. 953, 958 (Bankr. W.D.Va. 1986).

3 The determination of Debtor's liability in the above cases will not prejudice Debtor, as
4 its property is not subject to risk. *In re Jet Florida Systems, Inc.*, 883 F.2d 970, 974 (11th Cir.
5 1989). The pursuit of that lawsuit will only affect the assets and liability of Debtor's
6 implicated insurers, and will not affect the Debtor personally,. *In re White*, 73 B.R. 983 , 985
7 (Bankr.D. Col. 1987).

8 There is cause to grant relief from the stay to allow Del Webb to pursue Debtor's
9 insurance proceeds in these three cases. Should relief be granted, Del Webb will serve its
10 Third-Party Complaint in *Sun City Anthem Community Association v. Del Webb Communities,*
11 *Inc.*, upon Debtor and its insurance carriers so as to trigger the carriers' participation in the
12 case. Del Webb will further contact Debtor's carriers in *Del Webb Communities, Inc., v.*
13 *Adams Brothers Interiors of Nevada et. al.* and seek their participation in the case on the part of
14 Debtor. Similarly, in *Fisher et. al v. Del Webb Communities, Inc.*, Del Webb will inform
15 Debtor's carriers that it has been granted relief from stay and pursue its claims against Debtor
16 through them. In *Jacobsen* above, once litigation of the matter ensues, Del Webb will name
17 Debtor in its Third-Party Complaint and serve Debtor with that Complaint to trigger Debtor's
18 carriers' participation in that matter.
19

20 In *none* of these cases will Del Webb seek to enforce any judgment against Debtor or
21 the Debtor's bankruptcy estate. Debtor's insurance carriers are not protected by the
22 Bankruptcy Code. Furthermore, 11 U.S.C. § 524 does not act to shield third parties such as
23 insurers, who are subject to liability on behalf of the debtor. *In re Jet Florida Systems, Inc.*,
24 883 F.2d 970, 974 (11th Cir. 1989). Accordingly, the Court should grant Del Webb relief from
25 the automatic stay and permit it to pursue its claims against Debtor.
26

27 ///

1 **III. Debtor's Commercial General Liability Insurance Should Not Be Included in** 2 **the Bankruptcy Estate**

3 Del Webb seeks relief from the stay in order to pursue its claims against Debtor for the
4 limited purpose of establishing Debtor's liability in each of the three cases above, so that it may
5 recover from the Debtor's policies of commercial general liability insurance. Del Webb maintains
6 that the insurance in question is not subject to the stay. While Debtor maintains a possessory
7 interest in the applicable insurance policies, it does not have an equitable interest in those policies.
8 Any proceeds from those policies would not benefit the Debtor in reorganization, as this is a
9 Chapter 7 bankruptcy case. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427,430 (2nd Cir.1987).

10 The proceeds of Debtor's commercial general liability policies cannot be used by the
11 Debtor except to satisfy claims covered by those policies. The Debtor does not accumulate equity in
12 such policies. Accordingly, the policies at issue here should not be subject to the automatic stay and
13 should not be included in the bankruptcy estate. Additionally, the Debtor will not be prejudiced by
14 exposure to liability in this matter because "[t]he Debtor and his property are not subject to any
15 risk, and maintenance of the suit does not frustrate the policy of the Bankruptcy Code in giving the
16 Debtor a fresh start in his economic life." *In re Jet Florida Systems, Inc.*, 883 F.2d 970,974 (11th
17 Cir. 1989) (*internal citations omitted.*)

18 Del Webb's pursuit of its claims against Debtor will not affect property of the estate or in
19 any way cause an impact to the Debtor's economic future. Therefore, Del Webb requests this Court
20 grant its present Motion for Relief from stay.

21 **IV. CONCLUSION**

22 Del Webb respectfully requests this Court grant it relief from the automatic stay so that
23 it may pursue its claims against Debtor for the limited purpose of establishing Debtor's liability
24 in the following litigations:

- 25 • *Del Webb Communities, Inc., v. Adams Brothers Interiors of Nevada et. al.*,
26 *Clark County District Court Case No.: A604438*
- 27 • *Fisher et. al v. Del Webb Communities, Inc., Clark County District Court Case*
28 *No.: A559767*

- *Sun City Anthem Community Association v. Del Webb Communities, Inc., Clark County District Court Case No.: A608708*
- *Jacobsen v. Del Webb Communities, Inc., prelitigation matter pursuant to NRS 40.600 et. seq., for 2580 Deora Way, Henderson, Nevada*

This relief will not affect the Debtor or the bankruptcy estate directly, and Del Webb will only seek recovery through Debtor's general liability policies of insurance which are not part of the bankruptcy estate, from Debtor's insurers, who are not protected by the Code. Del Webb will waive any claims it has against the subject bankruptcy estate.

DATED this 28th day of May, 2010.

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